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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946.

749458
Sup. Ct.

No. 1253

In the Matter of V-I-D, INC., Debtor.

MARGUERITE S. GLOVER,
Petitioner,

vs.

McM. COFFING, Trustee in Bankruptcy, V-I-D, INC., Debtor,

LAWRENCE H. PRYBYLSKI, as Intervening Trustee, and

CHARLES J. KRAMER, Intervener,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF SUPPORTING SAME.

(Opinion Below Appended)

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PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE MATTER INVOLVED.

This case involves the power of a District Court to declare *void* a prior foreclosure *judgment* of a state court and the real estate *title* based thereon, on account of an alleged *latent* defect in the state court's jurisdiction over the landowner's person.

The question arose in the District Court in the following manner: A corporate debtor (Respondent, V-I-D,

Inc.) filed a reorganization petition under Chapter 10 of the Bankruptcy Act, listing this land in question as its asset (R. 1). The District Court appointed Respondent, Coffing, as its Trustee in Bankruptcy and he took possession of the land, but no reorganization has been accomplished. The Petitioner here, Marguerite S. Glover, filed an intervening reclamation petition in the bankruptcy proceeding, claiming to be the fee owner of this land under an independent title adverse to the title asserted by the corporate debtor and its Trustee.

Petitioner's title is based upon the state court's foreclosure judgment against the former fee owner, Hoover (R. 13-14, 106). The title of the corporate debtor and Trustee, Respondents, is based upon a quit-claim deed which the same former owner, Hoover, gave to the corporate debtor, for a consideration less than $100, several years *after* he had apparently lost his title by the foreclosure judgment and sheriff's deed thereon to this Petitioner (R. 11, 118).

The District Court adjudged that the state court's foreclosure judgment is *void* as to the former fee owner, Hoover, and void as to his grantee, the corporate debtor, thereby striking down Petitioner's title and upholding the title of the corporate debtor and Trustee, Respondents, on the ground that a *latent* defect existed in the state court's jurisdiction over this former owner's person (R. 132-134, 136; pars. 3-5). The alleged defect did not appear in the state court's *record* but was made apparent (as the District Court found) by extraneous oral evidence which the District Court received, over Petitioner's objection, to show that a *mistake* had been made in serving the state court's summons, so that instead of serving the Hoover who owned the land, the sheriff had served a stranger of like name who was not connected

with the land (R. 59-75). No relief against this alleged mistake or alleged wrongful judgment was ever sought or obtained by the owner, Hoover, or his grantee in the state court which rendered the judgment, but the judgment was attacked for the first time by the Trustee's answer and defense against Petitioner's reclamation petition in the bankruptcy proceeding, wherein he pleaded and allegedly proved by oral testimony the above facts about the mistaken service.

The District Court, in a memorandum opinion, acknowledged that: "The Trustee's assertion is a *collateral attack* on the judgment (of the state court). Nevertheless, where the judgment appears from the *record* to be *valid, extrinsic evidence* is admissible in a *collateral* attack upon the judgment to show that it is *void*" (R. 133, top). (Our emphasis).

Petitioner appealed, and the Seventh Circuit Court of Appeals affirmed (R. 181-186). Its opinion is reported as: *In re: V-I-D; Glover* v. *Coffing,* 158 F. (2d) 964.

The *facts* on which the Circuit Court of Appeals based its decision were: (1) That the owner, Hoover, "never *received* any *notice* of the foreclosure proceedings," due to a "*mistake* in service" of the summons (R. 182, top). (2) That "there was *no fraud* in securing the decree (judgment) against Don Hoover, but that *the* Don Hoover who was *served* with process in the foreclosure proceedings did not have any interest in the real estate" (R. 184, middle). (Our emphasis).

The *legal conclusion* which the Circuit Court of Appeals reached from the above facts was:

> "It is undisputed that Don Hoover of Jasper County, the owner of the real estate in question, was

> never *served* with *notice* of the foreclosure proceedings in the Superior Court of Lake County. The fee simple title to such real estate remained in him, after the foreclosure proceeding, the same as before those proceedings *because,* having had *no notice* thereof, he was in *no manner bound* or affected thereby • • • the judgment is *void,* and not merely erroneous, and it can be attacked directly *or collaterally* at any time" (R. 184-185). (Our emphasis).

After stating the above legal conclusion that the owner Hoover *was* the *party* defendant but was not bound because of lack of notice, the opinion turns around and states the *inconsistent conclusion* that the owner was *not* the *party* defendant, saying at the end of the opinion:

> "We agree with the findings of the district court that Don Hoover, the owner of the real estate in question, was *not* even a *party* to the foreclosure proceedings" (R. 185, bottom). (Our emphasis).

This last conclusion, like the first, was predicated on the same extraneous oral testimony that the owner Hoover did not live at a given address but the stranger did (R. 59-60, 64).

All the evidence on this subject, which the courts below used to strike down the state court's foreclosure judgment, is extraneous to the record in the foreclosure case. The foreclosure complaint named and *described* the Hoover who claimed an *interest* in the *land* and prayed *foreclosure* of *his* interest (R. 83-84). The state court, after service of summons on Hoover and before entry of decree, made an *express finding* that summons had been served on the defendant Hoover (R. 88), after which the state court also made an *implied finding* that it had *jurisdiction* over the *owner* by entering a foreclosure judgment on October 24, 1934, against Hoover and the

other defendants, ordering their "right, *title*, interest and claim" in the *land* sold at sheriff's sale but "saving to them however *their* statutory right to *redeem* therefrom within one year as allowed by law" (R. 90-91). The foreclosure judgment contained no money judgment against the owner Hoover personally, but merely declared the amount due on plaintiff's lien and ordered the land sold to satisfy it, (R. 90-91), because Hoover had acquired the land by quit-claim deed in 1932 subject to this lien (R. 136), the lien having been placed on the land in 1927 (R. 83, clause 8). The sheriff executed the decree by selling "the fee simple title to said real estate" (R. 102), after which the sheriff issued his deed to Petitioner purporting to convey the fee simple title to her on October 27, 1936 (R. 106).

The owner Hoover has never made any attempt to attack the foreclosure judgment, either in the state court or federal court. The only move he ever made was several years after the sheriff's sale to Petitioner, when he gave a quit-claim deed to this land to the debtor corporation for a consideration of less than $100, as recited on the face of the deed for purpose of federal document tax (R. 118). The quit-claim deed is dated February 23, 1939 but was held off the record by the debtor for some unexplained reason until April 13, 1943 (R. 118, 119). Four months and one day after receiving this unrecorded quit-claim deed the debtor filed its reorganization petition in the District Court on June 24, 1939, listing this land as its asset (R. 1).

Neither did Respondents, the corporate debtor and its Trustee, attack the state court's jurisdiction over the person of their grantor, Hoover, until this litigation was five years old in the bankruptcy court. During the first five years they were in court standing on their *sworn* answer *admitting*:

"That Don Hoover, *who was* then the record fee simple *owner* of said property, and (others, naming them), *were parties defendant.* That said judgment was rendered against all of said defendants, foreclosing special assessments, as alleged in said intervening petition • • • That said court *had jurisdiction* over the subject matter of said action, and over said property, and *over all of said defendants* for the purpose of making said judgment" (R. 16, middle). (Our emphasis).

The above answer of the Respondent Trustee was filed December 21, 1939 (R. 15). It was sworn to by him (R. 18, top). He filed an amended answer April 10, 1941 (R. 21) repeating the above admission *verbatim* (R. 22, middle). The above admission stood for five years, until he filed his second amended answer October 27, 1944 (R. 41) retracting the above admission and alleging for the first time that the court had no jurisdiction over the owner Hoover, because the stranger Hoover had been served with the summons (R. 46). This amendment was made over Petitioner's objection (R. 40). It furnished the basis for oral testimony introduced by the Respondent Trustee to attack the judgment (R. 59-75) more than ten years after the service of summons and entry of the judgment in the fall of 1934. The courts below have used this oral testimony as the basis for striking down the state court's judgment and Petitioner's title based thereon.

Basis of This Court's Jurisdiction.

Jurisdiction exists under Title 28, Sec. 347 (a), Judicial Code, sec. 240, amended, giving this court jurisdiction to review "any" case by certiorari to a Circuit Court of Appeals.

Questions Presented.

1 (a) Did the District Court usurp the function of the state court when it undertook to review the state court's jurisdiction over the landowner's person,—the review not being based on any defect of jurisdiction appearing on the state court's *record* but an *extraneous oral testimony* received by the District Court for the purpose of *going behind* and *voiding* the state court's judgment?

Does the decision violate Indiana Supreme Court decisions which hold that an Indiana judgment can be attacked for such defect *only in* the court which *rendered* the judgment?

(b) If the District Court had power to entertain this attack was the attack good?

Does the decision violate the Indiana Supreme Court decisions which hold that a judgment is *immune* to attack for lack of service of summons, unless this jurisdictional defect appears on the *face* of the judgment *record*?

(c) If the District Court could not strike down the state court's judgment by receiving extraneous evidence to disprove service of summons on the landowner, could it accomplish the same thing *indirectly* by receiving the same extraneous evidence as a basis for holding that the landowner Hoover was "not even a *party* to the foreclosure proceedings," when the state court's record shows that the party *sued* in the complaint and *adjudged* against in the judgment *was* the landowner Hoover?

Does such ruling violate the Indiana Supreme Court decisions which hold that the indentity of parties to a judgment "must be ascertained exclusively by inspection of the record?"

Reasons Relied on for Allowance of Writ.

I.

The District Court and Circuit Court of Appeals have committed a serious and unwarranted infringement on the Indiana state court's foreclosure *judgment* and on Petitioner's *title* to this Indiana land based on that judgment.

The courts below have not predicated their decisions on any special power of a District Court to do such a thing simply because it was sitting in *bankruptcy,* and no such special power exists. Petitioner was not a creditor in the bankruptcy proceeding but an outsider asserting a pre-existing, independent title adverse to the debtor corporation's title and asking merely that her title be recognized and the property released and turned over to her by the debtor corporation's Trustee (R. 14). Under such circumstances the Trustee had no greater rights to attack the pre-existing foreclosure judgment and her title thereon than the debtor corporation or its grantor, Hoover, would have in the absence of the reorganization proceeding:

> *In re: Lowman; Lafayette Life Ins. Co.* v. *Lowman* (CCA 7), 79 F. (2nd) 887, 890, 891
>
> 8 C. J. S.—Bankruptcy—Secs. 169 and 171

So the question of the District Court's power to do this thing is the same as it would be if the District Court had done it in *any civil action* where a person holding title under the state court's foreclosure judgment asserted the title in the District Court and that court went *behind* the state court's judgment and struck it down. The District Court's power to do this thing would, in turn, be no greater than the power of another state court of co-ordinate jurisdiction in Indiana to strike down the first

state court's judgment in this manner. *This brings the decision below in direct conflict with three related lines of Indiana Supreme Court decisions, as follows*:

A.

The decision conflicts with the following Indiana rule of judgments, established by the following Indiana Supreme Court decisions:

Courts of co-ordinate jurisdiction must give full faith and credit to each others' judgments when the alleged infirmity does not appear on the *face* of the judgment record. This is true whether the supposed infirmity results from a *latent* jurisdictional defect, fraud, or otherwise. The aggrieved party must seek relief *in the court which rendered the judgment*,—he cannot *ignore* the judgment until it is asserted against him in another court and then collaterally attack it in the other court, as was done here:

Bruce v. *Osgood* (1899), 154 Ind. 375, 378 bottom; 56 N. E. 325

Emerick v. *Miller* (1902), 159 Ind. 317, 327; 64 N. E. 28

B.

The decision conflicts with the following Indiana rule of judgments, established by the following decisions of the Indiana Supreme Court, and *confirmed by this Court*:

An Indiana foreclosure judgment is valid in spite of lack of notice to the owner, unless this jurisdictional defect affirmatively appears on the *face* of the foreclosure *record*.

Miedreich v. *Lauenstein* (1914), 232 U. S. 236, 246-247; 34 S. Ct. 309, 312; 58 L. Ed. 584, 591 (affirming 172 Ind. 140, *infra*)

Miedreich v. *Lauenstein* (1909), 172 Ind. 140, 141-144; 86 N. E. 963, 87 N. E. 1029

Johnson v. *Patterson* (1877), 59 Ind. 237, 239, 240

Nichols v. *Nichols* (1884), 96 Ind. 433, 434, 435

Clark v. *Clark* (1930), 202 Ind. 104, 113, 114; 172 N. E. 124

Chicago, etc. R. Co. v. *Grantham* (1905), 165 Ind. 279, 289; 75 N. E. 265

Smith v. *Hess* (1883), 91 Ind. 424, 425

Distinction: The only case cited in the Circuit Court of Appeals' opinion, *Calumet Teaming and Trucking Co.* v. *Young,* 218 Ind. 468, 33 N. E. (2d) 109, 583, does not purport to *change* the Indiana law or modify any of the above decisions or rules. It is not in point because it was a *statutory* review proceeding, in the nature of an appeal addressed to the *same court* which rendered the judgment, and hence was a *direct,* statutory attack, not a *collateral* attack (218 Ind. at pp. 470, 475). The courts below have adopted Respondents' error of seizing on an isolated sentence of dictum in that case, torn from its context at page 472 where the court was discussing the procedural question of waiving error, by failing to demur or answer. Citing such a case not in point, while ignoring all the above Indiana cases in point, is doing lip service to the rule in *Erie R.* v. *Tompkins,* while violating its spirit.

C.

The decision conflicts with the Indiana rule of judgments, established by the following Indiana Supreme Court decisions, that the *identity* of *parties* to a judgment "*must* be ascertained *exclusively* by inspection of the *record*:"

Sturgiss v. *Rogers* (1866), 26 Ind. 1, 9

Osborne v. *Storms* (1879), 65 Ind. 321, 325

Wherefore, Petitioner prays that this Court's writ of certiorari may issue to review this cause, and for all proper relief in the premises.

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Respondents.

BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI.

Summary.

I.

The District Court and Circuit Court of Appeals have committed a serious and unwarranted infringement on the Indiana state court's foreclosure *judgment* and on Petitioner's title to this Indiana land based on that judgment. These federal courts have usurped the functions of the Indiana state court by undertaking to review the

jurisdiction of the state court over the landowner's person, not on the basis of the state court's *record,* but by receiving *extraneous oral testimony* outside its record, and using that as a ground for *going behind* the judgment and *striking it down,* and striking down Petitioner's real estate *title* based thereon. This violates three related lines of Indiana Supreme Court decisions which protect this judgment and title:

A.

The decision violates the Indiana law of judgments, that coordinate courts in the state must give full faith and credit to each other's judgments when the alleged infirmity does not appear on the *face* of the state court's *record;* and that the aggrieved party must seek relief *in the court which rendered the judgment,*—he cannot ignore the judgment until it is asserted against him in another court and then collaterally attack it, as was done here:

Bruce v. *Osgood* (1899), 154 Ind. 375, 378 bottom; 56 N. E. 325

Emerick v. *Miller* (1902), 159 Ind. 317, 327; 64 N. E. 28

B.

The decision conflicts with the Indiana law of judgments, established by the Indiana decisions and *confirmed by this Court,* that an Indiana foreclosure judgment is valid in spite of lack of notice to the owner, unless this jurisdictional defect affirmatively appears on the *face* of the foreclosure *record*:

Miedreich v. *Lauenstein* (1914), 232 U. S. 236, 246-247, 34 S. Ct. 309, 312; 58 L. Ed. 584, 591 (affirming 172 Ind. 140)

Miedreich v. *Lauenstein* (1909), 172 Ind. 140, 141-144; 86 N. E. 963, 87 N. E. 1029

Johnson v. *Patterson* (1877), 59 Ind. 237, 239, 240

Nichols v. *Nichols* (1884), 96 Ind. 433, 434, 435

Clark v. *Clark* (1930), 202 Ind. 104, 113, 114; 172 N. E. 124

Chicago, etc. R. Co. v. *Grantham* (1905), 165 Ind. 279, 289; 75 N. E. 265

Smith v. *Hess* (1883), 91 Ind. 424, 425

C.

The decision conflicts with the Indiana law of judgments, that the identity of parties to a judgment "*must* be ascertained *exclusively* by an inspection of the *record*:

Sturgiss v. *Rogers* (1866), 26 Ind. 1, 9

Osborne v. *Storms* (1879), 65 Ind. 321, 325

ARGUMENT.

I.

The question here is the general power of federal courts to review the jurisdiction of, and strike down, judgments of state courts, *whenever* they find from the *oral testimony* before them that the state court failed to give notice to the judgment defendant, *even though* no such defect appears on the state court's *record.*

Neither of the courts below placed their decision on any question peculiar to bankruptcy law. They expressly placed it on the above general ground (R. 133, 184-185). Nor could they place their decision on any special power in bankruptcy, because Petitioner did not come before them as a creditor or as one claiming *under* the bankrupt; she came asserting an independent, pre-existing, adverse title to this land.

> "We think there is nothing in the Constitution clause conferring upon Congress the control over bankruptcy which authorizes it to *change prior rights* already created by the *states.* Under the proper exercise of that power, federal courts may be authorized to assume jurisdiction over and to administer property of bankrupts, but they *must* administer that property *as they find it*, and they have no power to *create new rights* in it for the benefit of either debtor or creditor."
>
> *In re*: *Lowman; Lafayette Life Ins. Co. v. Lowman* (CCA 7, 1935), 79 F. (2d) 887, 891, par. 7

See to same effect:

8 C. J. S.—Bankruptcy—Secs. 169 and 171

Such a sweeping assertion of power by the lower federal courts, and one containing so much potential mischief, oppression and conflict between the federal and state courts, deserves to be reviewed here on general principles.

But more specifically, the decision violates three related lines of Indiana Supreme Court decisions which govern Indiana judgments and real estate titles—a field where the federal courts were required to follow Indiana law even prior to *Erie R.* v. *Tompkins.* These lines of cases are:

A.

Cases holding that courts of co-ordinate jurisdiction must give full faith and credit to each other's judgments —that they cannot go *behind* each other's records—that for all defects not appearing on the face of the record the aggrieved party must seek relief *only* in the court which *rendered* the judgment:

> "The question is not whether *in truth,* as this court might decide on appeal, the Marion *Superior* Court had *jurisdiction* in the particular case, but whether or not that court was *competent to decide that it had jurisdiction* and whether it *must have so decided* before proceeding to judgment.
>
> • • •
>
> "The Marion *Circuit* Court did right in giving *full faith and credit* to a judgment, fair on its *face,* rendered by a domestic court of co-ordinate jurisdiction. It is to be presumed that the Marion *Superior* Court would promptly purge its record of any judgment tainted with fraud, if a *direct* proceeding for that purpose was brought before *that court;* but to do so, *in any way,* was not a prerogative of the Marion *Circuit* Court." (Our emphasis.)
>
> *Bruce* v. *Osgood* (1899), 154 Ind. 375, 378; 56 N. E. 325.

"It makes no difference in the conclusiveness of a judgment or decree that the same has been procured by *fraud*. Unassailed, it stands as a verity. If the injured party wishes to be relieved from its forces and effect, he must take some proper step to bring the question of his wrong *before the court that imposed it for correction*. 'A party against whom an *unauthorized* or inequitable judgment has been obtained,' continues Justice Mitchell, 'whether by *fraud* or *mistake*, can *not* treat the judgment as *invalid* until *he* has taken some proceeding, known to the law, to set it aside, or to secure its modification. Methods for obtaining a new trial, or to review a judgment for material new matter, or for error of law, are pointed out by the statute, and beyond the methods thus prescribed, courts possess inherent power, to an almost unlimited extent, to redress wrongs by modifying or setting aside judgments obtained by fraud *or mistake*. These methods, however, *all* contemplate proceedings *in the case* in which the unauthorized judgment is alleged to have been obtained." (Our emphasis.)

Emerick v. *Miller* (1902), 159 Ind. 317, 327; 64 N. E. 28.

B.

Cases holding that an Indiana foreclosure judgment is valid in spite of lack of notice to the owner, unless this jurisdictional defect appears on the face of the foreclosure record:

In the following leading case the owner's position was similar to, but stronger than, the owner's position in the case at bar. The owner brought an action in the *same* court which rendered the judgment, to vacate it for *lack of service* of summons. The owner showed that she was an *infant*, that she resided out of the county (as was alleged here) that she received no summons and had no knowledge of the action (as was alleged here) though

the court's record showed service of summons. The Indiana Supreme Court refused to vacate the judgment (*Miedreich* v. *Lauenstein* (1909), 172 Ind. 140, 86 N. E. 963, 87 N. E. 1029), and this Court affirmed, saying:

> "So far as this *record* discloses, the *purchaser at the sheriff's sale* had a right to rely upon the *record*, which *imported verity* as to the nature of the *service* upon the plaintiff in error. If this were not true, as the supreme court of Indiana points out, *there would be no protection* to parties who have *relied upon judicial proceedings* importing verity, upon the faith of which rights have been adjudicated and value parted with. In a case of this character the law must have in view, *not only the rights of the defendant* who has been a victim of a false return on the part of the sheriff, *but of persons who have relied upon the regularity of the return* of officials necessarily trusted by law with the responsibility of advising the court as to performance of such duties as are here involved. Were the law otherwise, *titles might be attacked many years after they were acquired*, where the party had been guilty of *no fraud*, and had acted upon the faith of judicial proceedings *apparently* perfect in every respect.
>
> *"This has been the rule of law applied to a similar situation in the courts of other states."* (Our emphasis.)
>
> *Miedreich* v. *Lauenstein* (1914), 232 U. S. 236, 246-247; 34 S. Ct. 309, 312; 58 L. Ed. 584, 591 (affirming 172 Ind. 140).

This Court reviewed the above case for the express purpose of determining if the above Indiana rule of judgments violated the 14th *Amendment*, and decided that the rule did not violate it, because the Indiana system affords adequate protection in normal cases and the amendment is not violated simply because a mistake or hardship occurs in an exceptional case (232 U. S. at pp. 246-247).

Public policy of maintaining the stability of *judgments* and *titles* based thereon, maintaining public confidence therein, and preventing them from being exposed to the uncertainty or falsity of oral testimony years afterward, is held by Indiana to outweigh the hardship to the individual in such exceptional cases. This Court so construed the Indiana law, and upheld it, in the last quoted case.

Though the above quotation from *Miedreich* v. *Lauenstein*, 232 U. S. 236, 246-247, mentions the public policy of sustaining judgments against a false or wrongful *return* by the *sheriff*, the same rule would protect a judgment against any mistake or wrong by the *court* in the entire process of rendering the judgment. The rule is for the purpose of protecting *judgments* of courts. It is not limited to protection of a sheriff's return. It protects that only as a means to the above end.

Directly in point on the facts with the case at bar, are the following cases where the Indiana courts *refused* to permit the owner to do the same thing which the federal courts here *permitted* him to do, namely, prove that he was absent from the jurisdiction, was not served with summons and had no notice, but that *the summons was served on a stranger of like name:*

> "The defendant having given the record in the foreclosure suit in evidence in support of his title, the plaintiff (*Ann Wathen*) offered to prove by competent witnesses, that on the 16th day of January, 1856, she was in Illinois, and therefore was not, and could not have been served with the process, and that, actually, she was *not served* with the process. She also offered to prove that there was *another woman* who represented herself and was known and called by the name of *Ann Wathen*, not one of the children of said Joseph E. Moore, who lived in

Jeffersonville at the time, and that process in said action *was served upon her*, if served at all.

"This evidence was objected to by the defendant, upon the ground that it would contradict the sheriff's return to the summons, and the objection was sustained, and the evidence *excluded*.

We are of the opinion, that *the ruling was correct*. The return of a sheriff to a summons is conclusive between the parties, and can not be contradicted by *parol evidence*." (Our emphasis.)

Johnson v. *Patterson*, (1877), 59 Ind. 237, 239, 240.

"It then avers that the judgment was rendered without any notice to him; that no summons in said case had been served upon him, and that he had no knowledge of said proceedings and judgment for more than one year after said judgment was rendered; that the summons had been *served upon another man* of the name of George D. Nicholas, but not upon this plaintiff (George D. Nichols): * * * This complaint shows that the summons in the original case was returned by the sheriff endorsed, 'Served by *reading and delivering* a copy of this writ to George D. Nichols.' And the plaintiff in this case can not be permitted now to successfully allege that the summons was *not* served upon *him* but upon *one* George D. Nicholas." (Our emphasis.)

Nichols v. *Nichols*, (1884), 96 Ind. 433, 434, 435.

Cases defining collateral attack and holding judgment is immune to collateral attack for lack of service of summons unless the defect affirmatively appears on the face of the record:

"The attack on this judgment was based on *matters outside the record*, and is therefore *collateral*. In order that a judgment may be attacked for *lack of service of summons* or notice, the defect *must* appear from the *record*. * * *

"Where a court has jurisdiction of the subject-matter, it will be *presumed,* in the absence of any showing to the contrary, that it acquired jurisdiction of the *person* before rendering judgment. Where a party to a judgment seeks to impeach its validity and have it declared *void,* in a subsequent action, by the allegation of facts dehors the record, and *not apparent on the face of the judgment,* such an attack is a *collateral* one, and *cannot* be made by a party to the record."

Clark v. *Clark* (1930), 202 Ind. 104, 113, 114; 172 N. E. 124.

"When a court of general jurisdiction has *assumed* to pronounce judgment, *every presumption* will be indulged in favor of its jurisdiction in that case, and the same is *unvulnerable* to *collateral* attack, as attempted in this case, *unless* the record *affirmatively shows* that it is void." (Our emphasis.)

Chicago, etc. R. Co. v. *Grantham* (1905) 165 Ind. 279, 289; 75 N. E. 265.

Authority in Opinion Below Distinguished.

Against all the above Indiana and United States Supreme Court cases, the opinion cites only *Calumet Teaming and Trucking Co.* v. *Young,* 218 Ind. 468, 33 N. E. (2d) 109, 583. An examination of that case shows that it contains one sentence which the Circuit Court of Appeals seized upon and took out of its context as authority for the proposition that whenever there is lack of service the judgment is void and can be collaterally attacked at any time (page 472). However, that sentence was pure inadvertent dictum as shown by the *nature* of the case and the *context.* It was a case where the defendant *had* been served with summons and had appeared, after which he was defaulted for failure to plead (470). Then he brought a *statutory petition for review* under Sections

2-2604 and 2-2605, Burns' Ind. Sts. 1933, which is in the nature of an appeal for error, except that it is addressed to the trial judge (page 475). The proceeding was brought in the *same court* which had rendered the judgment. The court was discussing the effect of defendant's failure to plead and held that his failure to plead waived everything except jurisdiction of the subject matter. Then the court made the following statement, which contains the dictum which the opinion below has seized upon and misapplied as authority:

> "The only error not waived by failing to raise a question of demurrer or answer is that involving the jurisdiction of the court over the subject-matter of the action. Where a judgment is rendered without jurisdiction of the subject-matter or without jurisdiction of the person, the judgment is void and not merely erroneous, and it can be attacked directly or collaterally at any time. Where a party has been served with summons, and appears, and is afterwards defaulted erroneously, the judgment is not void; it is merely erroneous. But unless there has been a motion to set aside the default, the error is not available in an action to review or on appeal."
>
> *Calumet Teaming and Trucking Co.* v. *Young*, (1940), 218 Ind. 468, 472, 33 N. E. (2d) 109, 583.

In the above case the Indiana court gives no indication of any intention to *overrule* the long line of cases, which we have just cited, nor to reverse the fundamental principles therein contained and affirmed by the Supreme Court of the United States as being the law of Indiana. (*Miedreich* v. *Lauenstein* (1914), 232 U. S. 236). It is apparent from the context and the nature of the case that the Indiana court did not even have these questions in mind.

But if we take the above dictum at face value, it is not in point. It merely states an *abstract* proposition about jurisdiction of the person being essential. It does not say *how* this lack of jurisdiction must be *shown* in a collateral attack. It does not say that this can be shown by *oral testimony* outside the *record*.

The point in dispute here is not the abstract one that a judgment can be attacked for lack of jurisdiction of the person. The point is *how* this lack of jurisdiction must be shown. All the Indiana cases say it must be shown by the *face* of the *record*, while the opinion below holds it may be shown by *outside oral testimony*.

We respectfully urge that a question as fundamental as this, involving Indiana judgments and real estate titles, should not rest upon a single citation of a dictum not in point, and should not fail to discuss the long line of Indiana cases and even a United States Supreme Court case bearing on this subject. All these cases were cited to both courts below. They ignored them.

A case cited in the District Court's opinion (R. 134) but not noticed by the Circuit Court of Appeals' opinion, is *State of New Jersey* v. *Shirk* (1920), 75 Ind. App. 275, 127 N. E. 861, which held under its peculiar facts that the service of summons was open to attack on two special grounds, not present in the case at bar:

(1) The attack there that was *direct* and not collateral as here (75 Ind. App. at p. 279, bottom).

(2) Plaintiff's attorney in the above case was found guilty of constructive *fraud* because he actively procured the false service (p. 280) whereas in our case the Master found "there was *no fraud*, actual or *constructive*, in securing the decree," (R. 80, par. 10), and the Circuit

Court of Appeals' opinion confirmed that finding, saying, "the Master found there was *no fraud* in *securing the decree against Don Hoover*" • • • (R. 184).

(3) The service in the above case was impeached only on a *secondary* matter—the return stated that the person served was the *agent* of the *corporate* defendant, and the defendant was permitted to prove that the person's *agency* had *ceased* (p. 284). The decision was *expressly placed* on that ground, that "the return is not conclusive as to *collateral facts*" (p. 281). That subject is quite remote from the basic question here, where we rely not merely on the sheriff's *return* but on the state court's *finding* and *adjudication* of *service.*

(4) The Appellate Court could not overrule the above decisions of the Indiana Supreme Court and did not purport to do so. Moreover, the rule of immunity of judgments to collateral attack for lack of service of summons was *subsequently* reaffirmed by the Supreme Court of Indiana, ten years after the above Appellate Court case, in the above quoted case of *Clark* v. *Clark* (1930), 202 Ind. 104, 113, 114; 17 N. E. 124.

C.

Identity of a party to a judgment depends on the record, not on extraneous evidence.

After going on the theory that the owner Hoover *was* the *party* defendant but was not bound because of lack of notice, the opinion turns around adopts the *inconsistent theory* that the owner Hoover was *not* the *party* defendant but that the stranger was (R. 185, bottom).

This is based on the same extraneous evidence as the first theory, and attempts to accomplish *indirectly* what

the above Indiana cases forbid to be done directly, namely, to void a judgment against the owner by extraneous evidence that someone else was served. It does the same damage to the judgment and title based thereon, and violates the same public policy against such tampering with judgments years afterwards by extraneous evidence. This unique and untenable ruling holds that the *identity* of a defendant in a foreclosure case can be *shifted* from the owner to a stranger of like name. This shift is not shown by the record but by extraneous evidence such as the existence of two men of like name living at different addresses. The net result is the same. On the first theory, the owner would destroy the judgment by showing *he* was *not served*. On the second theory he would destroy the judgment by showing that a *stranger* having no interest in the property *was served*. According to the courts below, a *secret shift* of defendants occurred without being shown on the record, so that the *owner* was *complained* against, the *stranger* was *adjudged* against; and neither the plaintiff, court, purchasers or public *knew* about it until *years afterward* when the owner or his grantee chose to disclose it by extraneous oral testimony in another court.

The *identity* of the *parties* to a judgment must be ascertained from the record, otherwise *every judgment could be upset years afterwards* by the device of claiming that a stranger to the subject matter of the case was the party defendant because of the extraneous fact that he was the person served with summons, or the extraneous fact that the stranger lived at a given address and the owner lived at another address. This ruling is an *indirect* attempt to accomplish the thing that is forbidden by the Indiana and United States Supreme Court cases above cited in Section B.

Further, the following Indiana Supreme Court cases hold that the *identity* of a *party* to a *judgment* cannot be collaterally attacked by evidence outside the record.

> "To determine whether any of the present plaintiffs but Rogers can maintain a suit upon the appeal bond it is important to inquire whether they became *parties* to the attachment suit commenced by Rogers. This *must* be ascertained *exclusively* by an inspection of the *record*. It can appear in *no other way*."
>
> *Sturgis* v. *Rogers* (1866), 26 Ind. 1, 9

> "The appellant offered to prove that the *judgment plaintiff* in the *decree*, given in evidence, was *not the owner* of the note and mortgage upon which it is founded. This evidence was *properly rejected*. The appellant has not shown us upon what ground he expected to attack a record in this *collateral* way, and we know of no such doctrine, but quite to the contrary, namely, that a *record*, good upon its *face*, can *not* be attacked *collaterally*."
>
> *Osborne* v. *Storms* (1879), 65 Ind. 321, 325

> "In deciding *who* are *parties* to the suit the court will *not* look beyond the *record*."
>
> *Davis* v. *Gray* (1872), 16 Wall. 203, 21 L. Ed. 447, 453.

The Lake Superior Court rendered a foreclosure judgment "against such *property*" and ordered it sold and it was sold, as stated in the Circuit Court of Appeals' opinion (R. 182, middle). That court could not have done this on the basis of service against a *stranger* who had no interest in the *property*.

> "Persons having no interest are neither necessary nor proper parties." (In a foreclosure case).
>
> 42 C. J. 40, Sec. 1551

Hoover is *identified* and *described* in the foreclosure complaint as being one of the owners of the land who failed to pay the assessments and it is alleged that he is one of those defendants who "claim some *interest* in said lot."

R. 83, Clauses 12 and 15.

R. 84, Clause 18.

The foreclosure decree orders the sale of "the right, *title,* interest and claim *of* said defendants in and to said real estate * * * saving to them, however, *their statutory right to redeem.*" R. 90, bottom.

"When a court *passes on* facts which are *essential* to establish its *jurisdiction,* its decision on such question is *conclusive* as against collateral attack." (Our emphasis). *Shirley* v. *Grove* (1912), 51 Ind. App. 17, 18 bottom; 98 N. E. 888.

"The question is not whether in truth, as this court might decide on appeal, the Marion Superior Court had jurisdiction in the particular case, but whether or not that court was competent to *decide* that it *had* jurisdiction and whether it *must* have so decided before proceeding to judgment."

Bruce v. *Osborn* (1899), 154 Ind. 375, 378 top; 56 N. E. 25

"We are strongly inclined to the opinion that it is a sound rule, applicable to courts of superior jurisdiction, that when the proceeding is of such a *character* that, before final action, the court *should,* from the *nature* of the case, ascertain whether it is such in fact that it has jurisdiction to act *as* it is invoked to do, and it *does so act,* the matter cannot be questioned collaterally. There are numerous cases to this effect."

Duquindre v. *Williams* (1869), 31 Ind. 444, 456.

Consequences of This Decision Upon Indiana Judgments and Decisions.

We respectfully urge this Court to consider the effect of the decision below upon Indiana judgments and titles. The decision means, and the opinion below expressly says, that *whenever* extraneous oral testimony is produced to show that summons was not in fact served upon the property owner, the foreclosure judgment and resulting title through judicial sale is "void" and that "it can be attacked directly or collaterally at any time" (R. 185). In this case the attack was first made by amendment of the Trustee's answer in 1944, *ten years after* the judgment was rendered, *and it could just as well have been made fifty years* after the judgment according to the opinion. We respectfully urge that if this decision stands as the law of Indiana judgments and titles, then nobody can rely upon a title derived through a foreclosure or other real estate case.

What is worse, the Indiana law on judgments and real estate titles will have been violated and changed, contrary to the rule requiring federal courts to adhere to state law affecting judgments and real estate titles within the state, —a rule which prevailed even before *Erie R.* v. *Tompkins.*

We do not minimize the importance of a property owner being given notice, but we urge this Honorable Court to consider a conflicting principle of equal or even higher importance, which we think has been completely submerged in the decision below, namely: that judgments of courts of record must carry security and public confidence and that titles resting thereon should not be upset, especially not collaterally in some other court "at any time" on the basis of extraneous oral testimony outside the record, as the opinion holds.

However, we believe that this Court is relieved of the responsibility of weighing these two conflicting principles because the Indiana Supreme Court has done so in scores of cases such as cited above in Section B, and this Court has upheld Indiana's right so to do. *Miedreich* v. *Lauenstein* (1914), 232 U S. 236, 246-247.

Certainly, the right of Hoover to be notified before losing his property is no greater here than that of the woman who lost her property by foreclosure judgment and was not permitted to prove that a stranger of like name was served, in the above quoted case of *Johnson* v. *Patterson,* 59 Ind. 237, 239-240. Nor is Hoover's right any more sacred than that of the minor child who lost her real estate because she never was notified in the above quoted case of *Miedreich* v. *Lauenstein,* 232 U. S. 236, 246-247, 34 S. Ct. 309, 312.

In fact, the equity of this attack is much weaker than in those cases—actually, it is so weak as to be open to grave suspicion—because the grantee corporation made no attempt to offer the testimony of, or explain the absence of, its allegedly wronged grantor Hoover, and because its quit claim deed recites that it paid Hoover "less than $100" for the supposed right to make this attack, (R. 118, middle), and then held its quit claim deed off the record from 1939 until 1943, long after this litigation had started in 1939 in the bankruptcy court, for some unexplained reason (R. 118). According to the estimate of both Hoover and his grantee, as shown on the face of the deed, this right which he lost by alleged lack of notice was worth less than $100.

Therefore it is respectfully submitted that the petition for certiorari should be granted.

Owen W. Crumpacker,
Jay E. Darlington,
Attorneys for Petitioner.

APPENDIX.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 9031. OCTOBER TERM AND SESSION, 1946.

IN THE MATTER OF
V-I-D, INC.,
Debtor.

MARGUERITE S. GLOVER,
Intervening Petitioner-Appellant,
vs.
McM. COFFING, Trustee in Bankruptcy, V-I-D, INC., Debtor, LAWRENCE H. PRYBYLSKI, as Intervening Trustee, and CHARLES J. KRAMER, Intervenor,
Appellees.

Appeal from the District Court of the United States for the Northern District of Indiana, Hammond Division.

December 19, 1946.

Before EVANS and MAJOR, *Circuit Judges,* and BALTZELL, *District Judge.*

BALTZELL, *District Judge*:

On August 7, 1934 a complaint to foreclose special assessments on a certain piece of real estate located in Gary, Lake County, Indiana, was filed in the Superior Court of that county by the U. S. A. Company, the owner of the assessments. The defendants included a person by the name of Don Hoover, and.....Hoover, his wife, and the Home Bank & Trust Company and Lawrence H. Prybylski, as

Trustees under a certain mortgage. Summons was issued to the Sheriff for service upon the defendant, Don Hoover, giving his address as 2212 West Twelfth Avenue, Gary, Indiana. This same address was endorsed in the complaint. There was a Don Hoover living at the address given in the summons and endorsed in the complaint, and service was had upon him at that address. He was not, however, the Don Hoover who was the fee simple owner of the real estate in question, but was another man of the same name. In fact, the Don Hoover served had no interest in such real estate and never asserted any interest therein. The Don Hoover who owned such real estate was a resident of Jasper County, Indiana, and never received any notice of the foreclosure proceedings, and the other Hoover ignored the summons. As a result thereof, the mistake in service was not discovered until long after judgment had been rendered.

A judgment by default was rendered against all of the defendants foreclosing the special assessments against such property, which was by such judgment ordered sold by the Sheriff of Lake County. The property was sold to the U. S. A. Company on April 15, 1935, and the Sheriff issued a certificate of sale. The certificate was within the year purchased by Marguerite S. Glover, the intervening petitioner-appellant in the instant case, hereinafter referred to as the intervenor, and, on October 27, 1936, after the expiration of the year of redemption, she surrendered the certificate and received a deed from the Sheriff which purported to convey to her the fee simple title. The deed was recorded, and the property was entered for taxation in her name.

On February 25, 1937, the Home Bank & Trust Company and Lawrence H. Prybylski, as Mortgage Trustees, both of whom were parties defendant in the foreclosure proceedings in the Lake Superior Court and upon whom service was had by publication filed verified petitions in such cause praying that the decree and judgment be vacated, that the case be reopened and that they be permitted to answer. Notice was served upon the U. S. A. Company, the plaintiff in that action, which company failed to appear. The judgment theretofore rendered was thereafter vacated and set aside. The trustees filed an answer and tendered into court the sum of $520, which represented the amount claimed by the U. S. A. Company to be due on the special assessments.

Thereafter, Don Hoover of Jasper County, owner of the real estate in question, executed a quit claim deed to V-I-D, Inc., a corporation located in Gary, Indiana. This deed was dated February 23, 1939, but was not recorded until April 13, 1943. A few months after the execution of the deed, that is, on June 24, 1939, V-I-D, Inc., filed a petition for reorganization under Chapter X of the Bankruptcy Act in the United States District Court for the Northern District of Indiana. The petition listed the real estate in question as a corporate asset and stated that it was encumbered by two mortgages and by an outstanding tax title. The petition was approved by the court, and McM. Coffing was appointed Trustee.

On December 1, 1939, the intervenor filed an intervening petition in the reorganization proceedings wherein she stated that she was the fee simple owner of the real estate claimed by the bankrupt to be its asset and asked that she be adjudged such owner, that possession be surrendered to her, that an accounting be had of the rents and profits collected by McM. Coffing, the Trustee, and that such funds be turned over to her.

On February 13, 1940, Lawrence H. Prybylski filed an intervening petition in the reorganization proceedings in which he stated that he was first mortgage trustee under a trust deed which was a prior lien against the real estate in question. Both McM. Coffing and Lawrence H. Prybylski asserted in their answers to the intervenor's petition that the judgment whereby she obtained title to the real estate had been vacated. The case was referred to a Special Master who found that the intervenor took title to the real estate subject to the right of those who had been served by publication in the foreclosure proceedings to open up the decree and defend the action within a period of 5 years from the date of the judgment, October 24, 1934; that she was charged with notice of the existence of such rights by virtue of the recitations in the Sheriff's Certificate of Sale and the Sheriff's Deed; that the vacation of the judgment operated to nullify and cancel all of her rights; that the district court had no jurisdiction to question the proceedings in the Lake Superior Court or the validity of the order vacating the decree of foreclosure; that intervenor was not a purchaser of property in good faith so as to exempt her from the effect of proceedings consequent upon the reopening of the judgment. The district court entered an order

approving the Master's Report to which the intervenor addressed a motion to vacate, which motion was approved, and the matter was resubmitted to the Master with instructions to hear further evidence and file a supplemental report on the following questions: (1) Whether the foreclosure decree was a personal decree against Don Hoover or based upon publication to him; (2) Whether the title asserted by the bankrupt to the real estate rested upon a quit claim deed from Don Hoover to the bankrupt.

On October 27, 1944, by permission of court, the Trustee filed a second amended answer wherein, for the first time, it denied that Don Hoover, the owner of the real estate in question, was a party defendant in the action in the Lake Superior Court, and asserted that the judgment of that court was void for the reason that no service of summons was had upon him, nor was any appearance made by him or on his behalf. Intervenor filed a reply to this answer and the case was again submitted to the Master. The Master again found that the intervenor took title to the real estate subject to the rights of those who had been served by publication to open up the decree within the time prescribed by statute, and that her remedy was to accept the tender made in the foreclosure proceedings as a refund of the purchase price. The Master also found that there was no fraud in securing the decree against Don Hoover, but that the Don Hoover who was served with process in the foreclosure proceedings did not have any interest in the real estate.

On December 3, 1945, the district court heard the report of the Master and the objections of the intervenor and of the Trustee, and overruled the objections and confirmed the report. The court found further that the judgment rendered in the foreclosure proceedings was void as to V-I-D, Inc., and that V-I-D, Inc. was the owner in fee simple of the real estate in question. From this judgment the intervenor has appealed. It is her contention that the district court erred in adjudging that the judgment of the Lake Superior Court was void as to V-I-D, Inc., and that V-I-D, Inc. is the fee simple owner of the real estate.

It is undisputed that Don Hoover of Jasper County, the owner of the real estate in question, was never served with notice of the foreclosure proceedings in the Superior Court of Lake County. The fee simple title to such real estate

remained in him, after the foreclosure proceedings, the same as before those proceedings because, having had no notice thereof, he was in no manner bound or affected thereby. It is also undisputed that he executed and delivered to V-I-D, Inc., the debtor in the bankruptcy proceedings, a quit claim deed for such real estate thereby conveying to it the fee simple title thereto. It is the contention of the intervenor that, under the Indiana law, the right to attack the judgment in foreclosure was personal with Hoover and did not pass to his grantee. It must be remembered, however, that the conveyance of the real estate in question from Hoover to the bankrupt was by means of a quit claim deed and not by warranty deed. There were no covenants in such deed upon which the grantee could rely. After the execution of this deed, Hoover had no interest in the real estate, as his interests had passed to his grantee, and any rights acquired by the vacation of the judgment passed to his grantee, the debtor in the bankruptcy proceedings. Intervenor further contends that if V-I-D, Inc. succeeded to Hoover's right to attack the judgment, such attack must be made in the court which rendered the judgment and cannot be made in the federal court. The law is clear in Indiana that where a judgment is rendered without jurisdiction of the subject matter or without jurisdiction of the person, the judgment is void and not merely erroneous, and it can be attacked directly or collaterally at any time. *Calumet Teaming and Trucking Co.* v. *Young* 218 Ind. 468, 33 N. E. (2d) 109, 33 N. E. (2d) 583. Insofar as the grantor Hoover is concerned, the judgment in the Superior Court was void and hence the proceedings in the district court were proper and are binding upon the intervenor. We agree with the finding of the district court that Don Hoover, the owner of the real estate in question, was not even a party to the foreclosure proceedings. The address of Hoover given on the summons was that of the Hoover of Gary who was served but who had no interest in the real estate.

Having arrived at this conclusion, it is unnecessary to consider the other alleged errors of the district court.

The judgment is

AFFIRMED.